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In the
Supreme Court of the United States

OCTOBER TERM, 1970

No. 1516

CHARLES A. SILVERMAN and ULKU SILVERMAN,
PETITIONERS,

v.

WILLIAM P. ROGERS, Secretary of State of the United States; JOHN N. MITCHELL, Attorney General of the United States; RAYMOND F. FARRELL, Commissioner of Immigration and Naturalization, and J. A. HAMILTON, District Director of the Immigration and Naturalization Service, Department of Justice, Boston, Massachusetts,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioners, Charles A. Silverman and Ulku Silverman, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on December 30, 1970.

Opinion Below

The opinion and judgment of the Court of Appeals, not yet reported, appears as Appendix A hereto. The opinion of the United States District Court for the District of Massachusetts, 309 F. Supp. 570 (D. Mass. 1970), appears as Appendix B hereto.

Jurisdiction

The judgment of the Court of Appeals for the First Circuit was entered on December 30, 1970. This Court's jurisdiction is invoked under Title 28 U.S.C.A. §1254(1).

Questions Presented

(1) Under the provisions of Title 8, U.S.C.A. §1182(e), is the "favorable recommendation" of the Secretary of State a part of the procedure for an alien's securing the waiver of the two-year foreign residency requirement once a finding of "exceptional hardship" to the alien's spouse (an American citizen) has been made by the District Director of the Immigration and Naturalization Service?

(2) If the Secretary of State's "favorable recommendation" is a part of the procedure for an alien's securing the waiver of the two-year foreign residency requirement once a finding of "exceptional hardship" to the alien's spouse (an American citizen) has been made by the District Director of the Immigration and Naturalization Service, is this "favorable recommendation" merely a matter of form or does it give to the Secretary of State a veto over the application for the waiver by the alien?

(3) If the Secretary of State's "favorable recommendation" rises to the level of a veto over the application for the waiver of the two-year foreign residency requirement,

even though a finding of "exceptional hardship" has been made, is the Secretary of State's exercise of this veto a violation of the Fifth Amendment rights of the alien's spouse?

(4) If the Secretary of State does have a veto over the waiver application, after "exceptional hardship" to the alien's spouse has been determined, is it a violation of the Fifth Amendments rights of the alien or the alien's spouse for the Secretary of State to exercise that veto without any semblance of procedural due process—without a hearing, the taking of evidence, representation of counsel, the making of a record, or the right to appeal?

Constitutional Provisions Involved

UNITED STATES CONSTITUTION, AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutory Provisions Involved

United States Code, Title 8, §1182(e) (1964). This section has now been amended by Title 8, U.S.C.A. §1182(e) (1970). This case was decided by the District Court before the statute was amended, and by the Court of Appeals after the statute was amended. The 1964 version of §1182(e) is set forth in Appendix C, and the current version of the statute is set forth in Appendix D.

Statement of the Case

Ulku Gurkan, a young, unmarried Turkish citizen, came to the United States in 1964 under the auspices of the Agency for International Development (AID)[1] in order to study psychiatric nursing. Eventually, her purpose, and that of her government's, was for her to qualify as an instructor at the Florence Nightingale School of Nursing in Istanbul. She received several extensions of her original visa which allowed her to complete her studies and obtain a Masters Degree in psychiatric nursing from Boston University in Boston, Massachusetts. Her last extension expired on January 30, 1969. Shortly thereafter, on March 9, 1969, she married Charles A. Silverman, an American citizen born in this country, and on April 24, of the same year, applied to the Immigration and Naturalization Service (INS) for a waiver of the statutory two-year foreign residency requirement—which requirement prevented her from continuing to stay in the United States. Title 8, U.S.C.A., §1182(e) (1964). Her application for the waiver was based on the "exceptional hardship" that her leaving the country would cause to her husband who is in ill health.

This finding was made by INS after a hearing at which Mr. and Mrs. Silverman were represented by counsel and were able to present medical evidence.

In accordance with the usual procedures followed by INS, request was then made to the Secretary of State for his "favorable recommendation" of the waiver.[2]

The Secretary of State recommended that the waiver not

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[1] See, n. 1 of the opinion in the Court of Appeals for Mrs. Silverman's status, and n. 2 regarding the Agency for International Development.

[2] See, 22 C.F.R., § 63.6(a) and (f), 63.7 (1970); 8 C.F.R., § 212.7(c) (1970). These regulations are reproduced in Appendix E and Appendix F.

be granted.[3] No hearing was held. The Silvermans did not participate in the decision-making.[4]

Because of that denial, INS notified Mrs. Silverman on December 11, 1969, that she would have to leave the United States on or before a specified date in February of 1970. She was informed, as per footnote 4 of the opinion of the Court of Appeals, of allegedly why the Secretary of State had turned down her application and told further that there was no appeal from that decision, as per 8 C.F.R., §212.7(c).

On January 30, 1970, injunctive relief to enjoin the commencement of deportation proceedings against Mrs. Silverman and for a judgment requesting the defendants to issue the waiver was commenced in the United States Federal District Court for the District of Massachusetts. The Silvermans contended that under proper interpretation of the statute, the Secretary of State's "favorable recommendation" was not necessary for approval of the waiver application, once "exceptional hardship" had been determined by INS. Further, that if the "favorable recommendation" *was* required, it was nothing more than *pro forma*, and did not amount to a veto of the waiver application. Appellants also base their claims on the unconstitutionality of the statute—that it was a violation of the Fifth Amendment if the Secretary of State was given veto once "exceptional hardship" to the alien's spouse had been determined. Additionally, that if the State Department did have the right to veto the application of the Silvermans, it was unconstitutional, in light of the procedural requirements of the Fifth Amendment, for the State Department to exercise such veto

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[3] See, n. 4 in the opinion of the Court of Appeals.

[4] The Silvermans were notified by a letter from District Director Hamilton to Mrs. Silverman, dated December 11, 1969. It is reproduced in Appendix G. The letter of the State Department to District Director Hamilton, which letter was the basis of Mr. Hamilton's letter to Mrs. Silverman, and which letter was first seen by the Silvermans at the hearing in the District Court, is reproduced in Appendix H.

without a hearing involving the presentation of evidence, cross-examination, the right to be represented by counsel, and the right to presentation and creation of a record, and with no opportunity for appeal. All of these procedural rights were *a fortiori* in the face of the finding by INS that this was a case of "exceptional hardship" to an American citizen, that is, the alien's spouse, the Silverman's contended.

The District Court took jurisdiction,[5] and decided that the "favorable recommendation" of the Secretary of State to the waiver application was not a part of securing the waiver application once "exceptional hardship" had been determined. Given this interpretation of the statute by the District Court, none of the other questions presented to the court by Appellants were considered. Rather, the District Court went on to assert that the next step in the waiver proceeding—the finding of "in the public interest"—should now be considered by the Department of Justice, and that until such time as that finding was made, no proceedings against Mrs. Silverman should go forward.

The Court of Appeals disagreed with the District Court as to the interpretation of the statute, asserting that the "favorable recommendation" of the Secretary of State was a part of securing the waiver application. Further, that that "favorable recommendation" amounted to a veto for the Secretary of State over the waiver application. Turning to the constitutional claims of the Silvermans, the Court of Appeals treated the constitutional claims only in the last paragraph of its opinion, and found them without merit —without ever mentioning whether or not it was proper procedural due process for the Secretary of State to exercise his veto in this case without a hearing.

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[5] See, n. 5 of the opinion of the Court of Appeals.

Reasons For Granting the Writ

I.

A Major "Statutory Ambiguity" Now Exists in Title 8, U.S.C.A., §1182(e). Is the "Favorable Recommendation" of the Secretary of State Part of the Requirement For the Waiver of the Two-year Foreign Residency Requirement of an Alien Once a Finding of "Exceptional Hardship" For the Alien's Spouse (an American Citizen) Has Been Made? This "Statutory Ambiguity," Which Has Been Considered by No Courts Other Than the Two Below, Has Been Increased by the 1970 Amendment to the Statute. Short of Further Legislation, Only a Decision by This Court Can Clarify the "Ambiguity."

The "statutory ambiguity" (as the Court of Appeals described it) of Title 28 U.S.C.A., §1182(a)—whether or not the "favorable recommendation" of the Secretary of State is a part of the procedure for an alien's securing of the waiver of the two-year foreign residency requirement, once a finding of "exceptional hardship" for the alien's spouse (an American citizen) has been made by the District Director—has only been considered by the two courts below.

The District Court, relying upon the language, punctuation, and syntax of the statute, as well as elementary grammar, concluded that the Secretary of State's "favorable recommendation" is not a part of securing the waiver application once "exceptional hardship" has been found. 309 F. Supp. at 574. Judge Garrity concluded as well that his interpretation of the statute is required in order to protect the "exceptional hardship" of the United States citizen from being overwhelmed by what might be contrary foreign-policy concerns of the Secretary of State. See, 309 F. Supp. at 574. The Court of Appeals, relying heavily

on a review of the history of the statute, resolved "the statutory ambiguity in favor of giving the Secretary a veto over hardship waiver applications." In short, Judge McEntee found the "favorable recommendation" of the Secretary a part of securing the waiver application, and that it was more than mere form, but gave to the Secretary a veto over the application. Judge McEntee did not attempt to square this interpretation, however, with an analysis of what protection must be afforded to the alien, and to the alien's spouse, once "exceptional hardship" has been determined. Additionally, he made no attempt to say that the statute on its face does not read as Judge Garrity declared.

Subsequent to the decision by Judge Garrity, and prior to the decision in the Court of Appeals, Congress amended this section, Title 8, U.S.C.A., §1182(3) (1970). See, 1970 *U. S. Cong. & Admin. News*, p. 874. At that time, it would have seemed particularly germane and desirable in light of the opinion by Judge Garrity, for Congress to make clear whether or not the Secretary of State's "favorable recommendation" is a part of the procedure for securing the waiver application once "exceptional hardship" has been found. Unfortunately, Congress did not do this. From this, it can be argued, therefore, that Congress was implicitly accepting the interpretation of the statute by Judge Garrity, and that if so, the opinion of the Courts of Appeals is contrary to this determination by Congress.

But Appellants concede that it is perhaps more probable that Congress just did not consider the decision by Judge Garrity. In any event, it certainly cannot be argued that the decision of the Court of Appeals could have been anticipated by Congress, and that this is why Congress did not act.

The 1970 Amendment added a further route for securing a waiver of the two-year foreign residency requirement—

"that the alien cannot return to the country of his nationality or last residence because he would be subject to persecution on account of race, religion or political opinion ..." See, Appendix D.

This amendment however, has only added to the confusion. No enlightenment has been given on whether the Secretary of State's "favorable recommendation" is a part of this provision any more than it is a part of the "exceptional hardship" provision. Further, that if the Secretary of State is given a role in these applications, whether that role rises to the level of a veto in either or both. In the new, last provision added to the statute in 1970, Congress at least made it clear that the Secretary of State's "favorable recommendation" is a part of the procedure whereby an alien can secure a "written waiver" by the foreign country, and then be permitted to stay in this country. But, again, we are only told that the Secretary of State is a part of this procedure, but not whether his role rises to the level of a veto.

This new, last provision of the statute, only adds to the overall "statutory ambiguity." For, it can certainly be said that if Congress wanted to make a "favorable recommendation" a part of the procedure in granting a waiver once the written consent of the foreign country had been obtained, Congress equally as likely probably wanted to have the Secretary of State's "favorable recommendation" as part of the procedure for cases of "exceptional hardship" or "persecution." But the opposite argument is of no less merit, that having said clearly in this last proviso that the Secretary of State's "favorable recommendation" is part of the procedure, Congress has implicitly said that the Secretary of State's "favorable recommendation" is, because it has not said so clearly, not a part of applications based on "exceptional hardship" or "persecution."

Appellants admit that both the Department of Justice and the Secretary of State have practiced making the Secretary of State's "favorable recommendation" part of the waiver application, and a veto at that, even though there has been the preliminary finding of "exceptional hardship." But this administrative practice does not, of course, mean that this is what the statute says, any more than this is what Congress meant or that this is what should be done in the light of the language of the statute to the contrary.

Additionally, and most cogently since only a decision by this Court will clear up the "statutory ambiguity"—unless Congress chooses in the future to clear it away with unequivocal language—the "statutory ambiguity" should not be allowed to exist given the extent to which personal liberties are involved in these cases. Cases involving "exceptional hardship" or "persecution" are no less demanding of statutory precision than those criminal cases involving possible incarceration. Further, these kinds of cases present "exceptional hardship" and "persecution" not as allegations of fact by petitioners in a law case, but as findings of fact by agents of the United States Government.

Lastly to all of this, there is the related question of whether or not Congress can write laws which are not just ambiguous, but even supposed to mean the opposite of the language which has been used, even though these statutes do, as they do here, deal with the most basic of personal liberties. Respectfully, it is suggested that just as this Court has never tolerated such legislative sloppiness, when the criminal process is brought to bear on personal liberties, so a similar criterion should be applicable here. See, *e.g.*, *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939). Without some sort of clarification of the "statutory ambiguity" here, and the matter of "statutory ambiguity" in general, persons will still be faced with the dilemma of always being

at the mercy of the legislative potential that a statute may mean something other than the meaning of the words and the punctuation.

II.

If This Court Decides To Resolve The "Statutory Ambiguity," It Should Do So In Favor Of Not Making The Secretary Of State's "Favorable Recommendation" A Part Of The Waiver Application In Cases Of "Exceptional Hardship." But If Not, The Recommendation Should Not Be Treated As A Veto But Merely *PRO FORMA*.

First off, it is apparent that Congress has carved out very narrow exceptions for §1182(e). The alien must be married to a United States citizen or have a child who is a United States citizen, or such spouse or child must be a lawfully resident alien. Next, the alien must want to reside or remain in the United States and not return to his native country or the country of last residence for the two-year period. Next, the departure must constitute an "exceptional hardship" to the spouse or to the child, before the waiver can be granted. This finding of "exceptional hardship" must be fully documented and impartially determined by a District Director of the Immigration and Naturalization Service. Then — and only then — if all these rocks and shoals have been transcended, does the alien then qualify for the waiver — and qualifies for such waiver only because of the "exceptional hardship" to the American citizen who is the alien's spouse, not because of any special privilege or benefit coming to the alien herself.

All of this, Appellants contend, constitutes immigration policy in keeping with the traditional exceptions in

situations involving hardship, persecution and the like, which Congress has permitted all throughout Title 8. These exceptions should not be subverted by spurious foreign policy concerns.

The Secretary of State does not need the veto for some independent program of the Department. Rather, he needs the veto only to act as a conduit for the demands of a foreign government, a proposition which is explicit in the new, last proviso of the statute. The Secretary of State could never be expected — in the wonderful words of the statute's tautology — to offer a "favorable recommendation" to an alien's staying here. At best, the Secretary of State could be neutral. It cannot be imagined that any policy of the Department of State could be benefited or furthered by Mrs. Silverman's staying here, or any other alien who might be in a similar position. The tautology of "favorable recommendation" *is* perhaps meaningful in those situations in which a request has been made by an interested United States Government agency. In such a case, the Secretary of State could be favorably disposed to the carrying out of a particular program. But what could possibly make the Secretary of State favorably disposed towards Mrs. Silverman's staying here, when such stay is only on the basis of Mr. Silverman's illness. Thus, the Secretary's right to accept or reject is really only the right to reject in hardship situations.

Congress, from the first adoption of an exchange-visitor program, affirmed that a back-door approach to immigration should not be created. See, *United States Information Educational Exchange Act,* 62 Stat. 6 (1948). Given this, Congress set forth the various narrow exceptions here. And, therefore, weight should be given to the fact that Congress did go to the trouble of setting forth these exceptions. Appellants offer that it seems more than a little illogical to have limited these exceptions even further

by giving the Secretary of State a veto. Foreign affairs do not require this power for the Secretary, immigration policy does not require this power, and the potential of certain aliens coming to this country does not require this power. In sending their citizens to this country, foreign countries have, of course, accepted the fact that the Department of State cannot guaranty the return of these aliens. This is apparent by the bond which the foreign country requires in most cases, and indeed in the present case. (See, n. 4 of the opinion of the Court of Appeals.) In short, the foreign country must have the bond, since the ability of the Secretary of State to return the alien can be abrogated by the actions of another department in pursuance of the will of Congress — as, *e.g.*, in our case, in finding "exceptional hardship." Nor is there any certainty that the Secretary of State's veto will cause the alien to return to the foreign country. By the terms of the statute itself, the alien can return for the two years to his country of last residence — which obviously can be other than the country of nationality. Further, the alien could always leave the United States for another country, and there reside, never returning to the country of nationality, or of last residence. (Then one would hope that if the alien did go to a foreign country, he could re-enter this country at some future date, greater than two years, but still without having been "physically present" for two years in the country of nationality.)

It would seem nothing short of fatuous to contend that the Secretary of State's control over foreign policy is such that the veto is required in order to submit an alien's spouse to "exceptional hardship," particularly when the spouse is an American citizen, or perhaps even *a fortiori,* to submit the alien himself to "persecution."

The practice of handling waiver applications by the Secretary of State would seem to bear on the fact that he does not need a veto. The several decisions set forth in Appendix I illustrate that in each case there is but one sentence that the Secretary of State recommends that the waiver be granted. In short, the matter is nothing more than *pro forma*.

As per the regulations, the Secretary of State has been given no standards on which to base his recommendation. He does not hold a hearing, receive evidence, or go through any of the other procedures which the Commissioner follows in determining the existence of "exceptional hardship." See, the regulations in Appendices G and H. Indeed, in Title 8, C.F.R., §212.7(c), all that is mentioned regarding the Secretary of State's "favorable recommendation" is that there is no appeal from the denial. In Title 22, C.F.R., §63.6, the recommendation is "requested." The recommendation is not treated as obligatory or as rising to the level of a veto. Additionally, in Title 22, C.F.R., §63.7, the regulation states that "in appropriate instances (he) shall transmit his recommendation to the Attorney General for the latter's finding and consequent action." This last, it would seem, is a recognition by the Secretary of State and Attorney General themselves that the recommendation is not always necessary, and should not be considered a veto, since what would be left for the Attorney General's "finding and consequent action" if the actions of the Secretary of State had made these two tasks nullities.

Perhaps the superfluity of all of this is best pointed out in the *Kawaski* case listed in Appendix I, the very last decision of the District Director which has been annotated. Here, the alien was allowed to stay because if his wife had to leave, his mother in law would suffer "mental anguish."

Lastly, the practice of determining "in public interest" is equally as meaningless as the Secretary's "favorable recommendation." The finding of "exceptional hardship" has been the determining factor — and we are left with a one-step procedure, rather than a three-step procedure.

In the decisions of the District Directors listed in Appendix I, the cases of *Davoudlaraian, Habib, Kim, Bass,* and *Courpas,* do not even involve the mention of the criterion of "public interest." And from these cases where "public interest" is absent in total, we come to the other cases listed in Appendix I, and such mention is always the same — again the one sentence that "public interest" is present. No reason is given why "public interest" is present, or how the determination was made, or even if the determination was actually made, or by what standards it was made — only the ritualistic, recitation of the criterion.

Turning to the regulations herein which deal with the role of the Attorney General, Title 8, C.F.R., §212.7(c), no mention of the words "public interest" even appears.

Thus, it would seem to be casuistry for the government to contend that because the administrative practice of the Department of Justice is to refer waiver applications to the Secretary of State, that it is, therefore, a part of the statute, when indeed it has not considered the "public interest" criterion as a part of the statute. The statute far more clearly requires a finding of "public interest" by the Department of Justice than it does the Secretary's "favorable recommendation." And, if the practice has been to treat what is clear in the statute as merely a matter of rote, how then can "favorable recommendation" be anything but a matter of rote? It is difficult to believe that

at this stage of our nation's history, foreign policy is for some reason more important than the domestic "public interest."

III.

THE SECRETARY OF STATE SHOULD NOT BE GIVEN A VETO OVER "EXCEPTIONAL HARDSHIP" CASES SINCE THAT WOULD CONSTITUTE AN APPLICATION OF THE STATUTE UNCONSTITUTIONAL TO THE SUBSTANTIVE DUE PROCESS RIGHTS OF THE ALIEN'S SPOUSE. FURTHER, TO ALLOW THE SECRETARY TO EXERCISE THE VETO WITHOUT ANY SEMBLANCE OF PROCEDURAL DUE PROCESS IS VIOLATIVE OF THE FIFTH AMENDMENT RIGHTS OF BOTH THE ALIEN AND THE ALIEN'S SPOUSE.

Regarding §1182(e), several constitutional points are clear: the two-year foreign residency requirement is constitutional; the failure of a District Director to find "exceptional hardship" will be upheld as long as there is "substantial evidence" to justify his finding; and the mere disruption of the marital relationship when an alien's spouse has to leave the country because of this section, does not in and of itself constitute "exceptional hardship." Cases setting forth these three points are, *inter alia*: *Swartz* v. *Rogers*, 254 F.2d 338 (C.A.D.C. 1958); *United States ex rel Hintopoulos* v. *Shaughnessy*, 233 F. 2d 705 (1956) aff'd 353 U.S. 72; *Harisiades* v. *Shaughnessy*, 342 U.S. 580; *Pardido* v. *Immigration and Naturalization Service*, 420 F. 2d 1179 (5th Cir. 1969); *United States ex rel Knauff* v. *Shaughnessy*, 338 U.S. 537; *Gras* v. *Becchic*, 221 F. Supp. 422 (S.D. Tex. 1963); *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206; *Application of Amoury*, 307 F. Supp. 213 (S.D.N.Y. 1969); and *Talavera* v. *Pederson*, 334 F. 2d 52 (6th Cir. 1964).

But the instant case goes beyond all of these cases. The finding of "exceptional hardship" has been made, and Appellants maintain, therefore, that it is unconstitutional for the Secretary of State, by imposing a foreign residency requirement on the alien, therefore, to impose an "exceptional hardship" upon the American citizen who is the alien's spouse. Merely requiring the alien's spouse to continue the marriage abroad, does not rise to the level of "exceptional hardship," but once having said that in a particular case — as, *e.g.*, ours — that it would be an "exceptional hardship" if the alien's spouse had to go abroad to continue the marriage, then the Secretary of State cannot constitutionally inflict this hurt upon the American citizen. It is the American citizen — the alien's spouse — whose rights are being offended, since, by the Government's own admission, it is inflicting upon him an "exceptional hardship." It is not, therefore, a matter of a benefit or a privilege to the alien that is involved, but rather that the Secretary is admittedly causing harm to an American citizen. And thus the alien must be allowed to remain here not as a matter of foreign policy or immigration policy, but because the Secretary of State cannot abrogate the rights of the alien's spouse.

This is emphasized by considering the last paragraph of the opinion of the Court of Appeals. Mr. and Mrs. Silverman do not contend that she enjoys any "special right to remain in this country." However, he does by the Government's own finding. Additionally, they do not contend that it is not "within congressional discretion to place conditions on her right of entry or continued residence." Nor do they maintain that the Government attacks "the validity of (a) marriage" when it requires the marriage to continue abroad. But, when the Government admits that the marriage cannot continue abroad, then indeed, it does attack "the validity of the marriage," and particularly

so when the absence would have to be for 10 years as in this case, and the parties cannot live abroad because of the health of Mr. Silverman, the person whose rights are involved. Lastly, to return again to the opinion of the Court of Appeals, the Silvermans maintain that there is something "unfair in permitting the Government to carry out its policies" here. The unfairness is that it is depriving Mr. Silverman of his right to have his marriage continue, either in this country or abroad. Because by the Government's action the marriage cannot continue here, and by the Government's admission, as to Mr. Silverman's health, the marriage cannot continue abroad.

And thus, where as here, the absence is to be for 10 years —and who can say if only for that length of time and not longer—the validity of the marriage is attacked. Mr. Silverman's rights are being abrogated.[6]

If it is the interpretation of this statute that the Secretary of State does have a veto in situations where "exceptional hardship" has been found, appellants respectfully submit that this Court should consider *how* that veto is exercised. And, that where it has been exercised, as in this case, without benefit of a hearing, without benefit of representation by counsel, without the benefit of the taking of evidence, without the benefit of in any way knowing the documents in evidence which have been used against the Appellants, and without any opportunity to review any record or to appeal, that such procedure is constitutionally deficient. This petition is submitted to this Court only three months after the Court, speaking through Mr. Justice Douglas, said:

> "It is significant that most of the provisions of the Bill of Rights are procedural, for it is procedure that

[6] See, *Loving* v. *Comm. of Virginia*, 388 U.S. 1, 12 (1967). Marriage is a "basic civil right."

(marks) much of the difference between rule by law and rule by fiat." *Wisconsin* v. *Constantineau*, U.S. , 91 S.Ct. 507, 509 (1971).

In that case, Mr. Justice Douglas went on to say, 91 S.Ct. at 510, that "... (t)he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of the criminal conviction, is a principle basic to our society. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95 L.Ed. 817 (concurring opinion)." Grievous loss, as this Court has pointed out, can be something less than a criminal conviction. For purposes of this case, however, it is suggested that the grievous loss—dissolution of a marriage, condemnation to a country for ten years—is even more than "the stigma and hardship(s) of (a) criminal conviction."

Appellants have never been heard by the Secretary of State. This in and of itself would be sufficient to require that if the Secretary of State does have the veto, that the exercise in this case or any similar such case be only after a hearing, and that this case be, therefore, committed back for a hearing. The facts of this case illustrate so poignantly why a hearing is necessary. Mrs. Silverman does not remember that when, as a young girl, she came to this country, not reading English too well, and signing many documents, none of which she now recalls, nor copies of which she was given, that she did at that time sign a bond for $40,000.00 requiring her return to Turkey. Nor do her parents remember. At the very minimum they would like to be able to see a copy of the bond. No copy of the bond has ever been presented to them. If, indeed they did sign a bond, which they do not now remember, both Mrs. Silverman's family in Turkey and Mr. Silverman's family here in the United States stand ready, willing and able to com-

mence payment on the $40,000.00. Since Turkey, several years ago, apparently made the choice that if Mrs. Silverman did not return they would request a repayment of $40,000.00, Mr. and Mrs. Silverman—and their families—stand ready to fulfill this obligation. But in the posture of this case, they cannot fulfill this obligation for the reason that they are not given the chance to fulfill it, if it exists.

Thus, at the very minimum, a hearing would allow them the opportunity to fulfill this obligation—and to ascertain it. Additionally, at a hearing represented by counsel, Mr. and Mrs. Silverman would like to contest the fact that the Turkish government "believes her services are indispensable, and (that) a position is being held open for her at the Florence Nightingale Nursing Home in Istanbul." (See, n. 4 of the opinion of the Court of Appeals. See, also Appendices G and H.) The Court of Appeals accepted this as *fact*. One can only ask why. (The position may be open in Turkey, but short of a condition of servitude, it certainly is Mrs. Silverman's option to take or to refuse the position.) The Appellants have no way of knowing that it is a fact, anymore than the Government does. How then could the Court of Appeals know that it is fact. It is precisely whether or not such a fact exists that would be the subject of a hearing before the Secretary of State, the kind of hearing which the Appellants now seek, the kind of hearing which would allow for the determination of the facts.

Appellants further suggest that the requisite of a hearing in immigration matters has already been decided by this Court. In *Shaughnessy* v. *Mezei*, 345 U.S. 206, 212, this Court held:

> "It is true that aliens who have once passed through our gates even illegally may be expelled only after proceedings conforming to traditional standards of

> fairness encompassed in due process of law. *The Japanese Immigrant Case*, 189 U.S. 86, 100-101 (1903); *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 49-50 (1950); *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 598 (1953)."

Further in that case, the Court reiterated the point:

> "To be sure, a lawful resident alien may not be deprived of his constitutional rights to procedural due process. *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 601 (1953); cf. *Delgadillo* v. *Carmichael*, 332 U.S. 338 (1947)." *Id.* at 213.

Since Mrs. Silverman, for her part, is a "lawful resident alien," it is a violation of her constitutional rights not to give her procedural due process. This then is not an immigration case involving benefits or privileges. It is squarely in line with *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), and *Wisconsin* v. *Constantineau*, U.S. , 91 S.Ct. 507 (1971).

Mr. and Mrs. Silverman are entitled to a hearing before their marriage is destroyed and she is sent off to Turkey for 10 years.

It is further respectfully suggested that since there is no hearing, there can be no review, and as one observer has commented:

> "The upshot is that *there are very few discretions, however broad, substantia'ly effecting the person or property of an individual which cannot at some point come under judicial surveillance.*" (Emphasis in original.) Jaffe, *Judicial Control of Administrative Action*, 374.

As Mr. Justice Brandeis described the situation in *St. Joseph's Stock Yard Co.* v. *United States*, 298 U.S. 38, 84 (1936):

> "The supremacy of law demands that there shall be the opportunity to have some courts decide whether an erroneous ruling of law was applied; and whether the proceedings in which the facts were adjudicated were conducted regularly. To that extent, the person asserting the right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality."

What the government asks this Court to sustain is a veto power which is not written down, which is based on no standards, which requires no hearing, and—with biting irony—which provides no right of appeal. Procedural due process, in short, is missing.

If a court decision can be appealed, why then cannot a decision of an appointed official such as the Secretary of State or his agent be appealed, when personal liberties are so largely involved. Appellants do not contend that procedural due process is necessary in the hundreds of thousands of administrative decisions which must be made in the running of our government at all levels.

Rather it is that in the extreme hardship of the current situation, a hardship which makes trivial some of the "exceptional hardships" found by the District Directors in the cases listed in Appendix I, the government should not be allowed uncontrolled discretionary justice on the part of officials in the Department of State. For discretionary justice, in cases such as this one, in which the infliction of hardship is even greater than that associated with criminal penalties, the Appellants, in the words of Professor Davis, do "not oppose discretionary justice that is properly con-

fined, structured, and checked; . . . (but) oppose discretionary justice that is improperly unconfined, unstructured, and unchecked." Davis, *Discretionary Justice,* 26. To give an official discretion by class in terms of rules promulgated, is one thing,[7] but to give an official case-by-case discretion without the benefit of any promulgated rule and without the opportunity to review what the official has decided, and in a situation where an "exceptional hardship" to an American citizen is involved, simply cannot stand the test of procedural due process.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the First Circuit.

Respectfully submitted,

HERBERT S. SWARTZ
1330 Beacon Street
Brookline, Massachusetts
Counsel for Petitioner

[7] *Fook Hong Mak* v. *Immigration & Naturalization Service*, 435 F.2d 728 (2 Cir. 1970).

APPENDIX A

Opinion and Judgment of the United States Court of Appeals For the First Circuit

No. 7687.

CHARLES A. SILVERMAN and ULKU SILVERMAN,

PLAINTIFFS, APPELLEES,

v.

WILLIAM P. ROGERS, Secretary of State of the United States; JOHN N. MITCHELL, Attorney General of the United States; RAYMOND F. FARRELL, Commissioner of Immigration and Naturalization, and J. A. HAMILTON, JR., District Director of the Immigration and Naturalization Service, Department of Justice, Boston, Massachusetts,

DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

George W. Masterton, Attorney, Department of Justice, with whom *Herbert F. Travers, Jr.*, United States Attorney, *Mary M. Brennan*, Assistant United States Attorney, *Will Wilson*, Assistant Attorney General, and *Paul C. Summitt*, Attorney, Department of Justice, were on brief, for appellants.

Herbert S. Swartz for appellees.

December 30, 1970.

McENTEE, *Circuit Judge*. The principal issue raised by this appeal is one of statutory construction. The relevant facts are not in dispute and may be stated briefly as follows. In July 1964 Ulku Gurkan, an unmarried Turkish citizen, came to the United States as an exchange visi-

tor [1] under the auspices of the Agency for International Development (AID).[2] Her purpose in coming here was to study psychiatric nursing in order to qualify as an instructor at the Florence Nightingale School of Nursing in Istanbul. She obtained several extensions of her original visa which enabled her to complete her studies and obtain a master's degree in psychiatric nursing from Boston University. The last extension expired on January 30, 1969. On March 9, 1969, she married Charles A. Silverman, an American citizen, and on April 24th of the same year applied to the Immigration and Naturalization Service (INS) for a waiver of the statutory two-year foreign residence requirement which normally she would have to meet before being allowed to return to the United States. 8 U.S.C. § 1182(e) (1964). In her application for the waiver she stated that to require her to leave this country would impose exceptional hardship on her husband because of his ill health. The relevant statutory waiver provision upon which she relies reads as follows:

> "*Provided further,* That upon the favorable recommendation of the Secretary of State, pursuant to the request of an interested United States Government agency, or of the Commissioner of Immigration and Naturalization after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien), the Attorney General may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney

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[1] She had J-1 visa status, so-called, under 8 U.S.C. § 1101(a)(15)(J) (1964).

[2] AID is an agency in the United States Department of State. *See* 22 C.F.R. ch. II (1970).

General to be in the public interest . . . ." 8 U.S.C. § 1182(e) (1964).

Despite strenuous objection from AID, the INS found that the applicant's compliance with the two-year foreign residency requirement would impose exceptional medical hardship on her new husband and requested that the Secretary of State recommend whether the waiver should be granted.[3] The Secretary recommended that the waiver not be granted.[4] On December 11, 1969, INS notified Mrs. Silverman, *inter alia*, that both the State Department and INS had carefully reviewed the facts in her case; that the State Department had recommended against granting her waiver; that accordingly her application had been denied and that she must arrange to leave the United States on or before a specified date.

On January 30, 1970, the Silvermans brought the instant suit to enjoin the commencement of deportation proceedings against Mrs. Silverman and for a judgment instructing the defendants to issue the waiver. They argued that under the statute only the INS was authorized to make the decision in hardship waiver applications and that the Secretary of State's recommendation was a mere matter of form. Alternatively, they contended that to deny Mrs. Silverman residency in the United States would deprive both plaintiffs of their right to liberty under the Fifth Amendment. The defendants moved for dismissal of the com-

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[3] *See* 22 C.F.R. §§ 63.6(a) and (f), 63.7 (1970); 8 C.F.R. § 212.7(c) (1970).

[4] In reply to INS, the Secretary stated, "we have had extended discussions with the Agency for International Development and the Turkish Government concerning the training given to Mrs. Silverman. The Turkish Government believes her services are indispensable, and a position is being held open for her at the Florence Nightingale Nursing Home in Istanbul. In addition, she has signed a bond which obligates her to serve for a period of ten years in Turkey after finishing her training here. If she does not return, those who signed as guarantors for the bond will be required by the Turkish Government to pay approximately $40,000 as compensation."

plaint or in the alternative for summary judgment. The district court took jurisdiction of the case [5] and decided for the plaintiffs, granting a preliminary injunction on February 25, 1970, and a final injunction on March 9, 1970. The Government appealed.

The district court construed the statutory waiver proviso set out above "to provide that decision by the Attorney General whether to waive the foreign residence requirement may be based either upon the favorable recommendation of the Secretary of State or upon that of the [INS] Commissioner after determination of exceptional hardship." The court then went on to say,

> "This construction seems to be required by the plain language of [the proviso], especially the punctuation and the word 'of' as underlined in the following excerpt, 'That upon the favorable recommendation of the Secretary of State, pursuant to the request of an interested United States Government Agency, or of the Commissioner of Immigration and Naturalization after he has . . . .' " *Silverman* v. *Rogers*, 309 F.Supp. 570, 574 (D. Mass. 1970).

The court noted that its decision was "at odds" with regulations implementing the exchange-visitor program [6] but

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[5] 5 U.S.C. §§ 701-706 (Supp. V, 1970); *Immigration and Naturalization Service* v. *Stanisic*, 395 U.S. 62, 68 n.6 (1969); *Cheng Fan Kwok* v. *Immigration and Naturalization Service*, 392 U.S. 206, 210 (1968); *Butterfield* v. *Immigration and Naturalization Service*, 409 F.2d 170, 173 (D.C. Cir. 1969).

[6] The court saw a conflict between its opinion and 22 C.F.R. §§ 63.6 and 63.7 (1970), but not with 8 C.F.R. § 212.7(c) (1970). Others commenting on the waiver proviso in the instant case also appear to disagree with the district court. *See Mendez* v. *Major*, 340 F.2d 128, 130 (8th Cir. 1965) (dictum), *affirming* 226 F.Supp. 364, 366 (E.D. Mo. 1963) (dictum); *Gras* v. *Beechie*, 221 F.Supp. 422, 423 (S.D. Tex. 1963) (dictum); *Matter of Tran*, 11 I.&N. Dec. 395 (Dist. Dir., 1965); *contra*, *Samala* v. *Immigration and Naturalization Service*, 336 F.2d 7, 9 n.4 (5th Cir. 1965) (dictum); *see also* 1 Gordon & Rosenfield, Immigration Law and Procedure § 6.8h(3) (1970) (ambiguity noted).

felt that its interpretation guarded "the interest obviously underlying the particular proviso, to wit, protection of a United States citizen against exceptional hardship, which interest ordinarily conflicts with considerations of foreign policy of prime concern to the Secretary of State."[7]

We start with the thought that in spite of some awkwardness in its structure, the statute lends itself to a construction unfavorable to appellees. It also lends itself to a construction favorable, but we cannot agree with the district court's view that this latter is "required by the plain language." 309 F.supp. at 574. The question is, which clause modifies which. The ultimate provision for the waiver of the two-year foreign residence requirement may be read to be conditioned upon, (a) the favorable recommendation of the Secretary of State pursuant to the request of an interested United States Government agency, or (b) the request of the Commissioner of Immigration and Naturalization after he has determined hardship. However, it is equally possible to read the statute as authorizing waiver conditioned upon the recommendation of the Secretary of State when he (a) has received a request of a government agency, or (b) has received a request of the commissioner after he had determined hardship.

In the light of this ambiguity it becomes important to examine the legislative history. The proviso in question was added by the 1961 revision of the statute. It was derived from a then-existing provision which read,

> "upon request of an interested Government agency and the recommendation of the Secretary of State, the Attorney General may waive such two-year period of residence abroad in the case of any alien whose

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[7] 309 F.Supp. at 574. We note in passing that the hardship provisions apply not only to a spouse or child who is an American citizen, but also to an alien spouse or child who is admitted for permanent residence. 8 U.S.C. § 1182(e) (1964).

> admission to the United States is found by the Attorney General to be in the public interest." Act of June 4, 1956, ch. 356, 70 Stat. 241.

Although the 1956 statute did not make any provision for hardship cases, the State Department's regulations took them into account. 22 Fed. Reg. 10840 (1957).[8] Between June 1956 and the end of 1960, the State Department approved 2194 waiver applications out of 2674 such applications received, and 1812 of those approved were hardship cases.[9] This liberal policy[10] was strongly disapproved by Subcommittee No. 1 of the House Committee on the Judiciary.[11] The subcommittee stated:

> "It is believed to be detrimental to the purposes of the program and to the national interests of the countries concerned to apply a lenient policy in the adjudication of waivers *including cases where marriage occurring in the United States, or the birth of a child or children, is used to support the contention that the exchange alien's departure from this country would cause personal hardship.*" H.R. Rep. No. 721, 87th Cong., 1st Sess. 121 (1961) (emphasis in original).

In light of this, the subcommittee proposed language in place of the then-existing proviso, which is substantially similar to that finally adopted, to wit:

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[8] The hardship dealt with in the regulations was that of the exchange visitor and not that of his spouse or child as is the case under the instant statute.

[9] H.R. Rep. No. 721, 87th Cong., 1st Sess. 81 (1961). Only 499 applications had been refused during that period and 71 were still pending at the end of the period.

[10] The State Department referred to its policy as a "liberal attitude." H.R. Rep. No. 721, *supra* at 33. But the rare refusal of waiver was made "when the foreign government strongly desires the individual's return abroad." *Id.*

[11] H.R. Rep. No. 721, *supra* at 121 (1961); *see also id.* at 88 (speech of Congressman Walter, chairman of the subcommittee) and *id.* at 121 (remarks adopted by whole subcommittee).

> "*Provided further,* That upon the favorable recommendation of the Secretary of State, pursuant to the request of a Government agency desiring to obtain the alien's services for the prospective benefit to the national defense, economy, welfare or cultural interest, or of the Commissioner of Immigration and Naturalization after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien), the Attorney General may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest." *Id.* at 122.

The House Committee on Foreign Affairs specifically adopted this suggestion for the 1961 bill. 1961 U.S. Code Cong. & Admin. News, p. 2773. In particular, it noted that it was reenacting and amplifving the earlier proviso — and it also noted that it made only one "important change" in the existing law, namely, to allow the Secretary of State to approve variances in the place where the two-year foreign residence requirement could be fulfilled. *Id.* at 2774. The House approved the committee language as reported. 107 Cong. Rec. 18281 (1961).

The Senate version would have kept the language of the then-existing proviso, Act of June 4, 1956, ch. 356, 70 Stat. 241. It should be noted that the Senate report on the bill stated that "The waiver is subject to a request by an interested agency of the Federal Government *and recommendation by the Secretary of State to the Attorney General.*" S. Rep. No. 372, 87th Cong., 1st sess. 19 (1961) (emphasis added). When the Senate received the House version, it voted to substitute the language of its own bill for the House bill and send the bill to confer-

ence. 107 Cong. Rec. 18515 (1961). The language of the then-existing proviso (as readopted by the Senate) and the new version drafted by Subcommittee No. 1 of the House Committee on the Judiciary were combined to make the final version. In its conference report, the House managers said:

> "[The House bill] reenacted and amplified [Act of June 4, 1956, ch. 356, 70 Stat. 241] but contained one modification, namely, the requirement of the finding by the Secretary of State that the 2 years' residence abroad of an exchange alien, if not occurring in the country from which he came to the United States, is in accord with the basic purpose of the exchange program. *The Senate amendment contained language similar in intent but different in wording.* The Senate conferees accepted the House language with amendments." 1961 U.S. Code Cong. & Admin. News, pp. 2779-80 (emphasis added).

We conclude, therefore, that the intent of both the House and Senate versions of the 1961 proviso now in 8 U.S.C. § 1182(e) (1964), *supra*, was the same, namely, to include the Secretary of State in the hardship waiver process. Indeed, it would have been illogical to *reduce* the number of agencies wielding a veto, given the expressed purpose of Subcommittee No. 1 to grant fewer hardship waivers.

Weight must also be given to the regulations, which have consistently given the Secretary a decisive voice in all waivers. *See* note 3, *supra;* 35 Fed. Reg. 5958 (1970), 1970 U.S. Code Cong. & Admin. News, p. 1132. "In case of ambiguity it is appropriate to give weight to the view of the body entrusted to administer the act." *Massachusetts Trustees of Eastern Gas and Fuel Associates* v. *United States*, 312 F.2d 214, 222 (1st Cir. 1963), *aff'd*, 377 U.S. 235 (1964); *accord, American Power & Light Co.* v. *SEC*, 141 F.2d 606, 621 (1st Cir. 1944), *aff'd*, 329 U.S. 90 (1946).

Finally, we note that Congress has not seen fit to question the administrative practice. *See* 8 U.S.C.A. § 1182(e) (1970), *amending* 8 U.S.C. § 1182(e) (1964); 1970 U.S. Code Cong. & Admin. News, p. 874. We therefore resolve the statutory ambiguity in favor of giving the Secretary a veto over hardship waiver applications.

We turn now to plaintiffs' alternative argument, that to allow the government to refuse Mrs. Silverman the right to reside in the United States would deprive both plaintiffs of their constitutional rights. We see no merit in this contention. Mrs. Silverman enjoys no special right to remain in this country, it being within congressional discretion to place conditions on her right of entry or continued residence. *Harisiades* v. *Shaughnessy,* 342 U.S. 580, 584-591 (1952); *Perdido* v. *Immigration and Naturalization Service,* 420 F.2d 1179, 1181 (5th Cir. 1969). Plaintiffs also argue that the goverment's action here is destroying their marriage. Even assuming that the federal government had no right either to prevent a marriage or destroy it, we believe that here it has done nothing more than to say that the residence of one of the marriage partners may not be in the United States. It does not attack the validity of the marriage. *Swartz* v. *Rogers,* 254 F.2d 338, 339 (D.C. Cir.), *cert. denied,* 357 U.S. 928 (1958); *cf. Papageorgiou* v. *Esperdy,* 212 F.Supp. 874, 877 (S.D.N.Y. 1963); *see also Mendez* v. *Major,* 340 F.2d 128, 132 (8th Cir. 1965). In the instant case at least one and presumably both of the parties were well aware before their marriage that Mrs. Silverman had agreed to return to Turkey. Under these circumstances, we see nothing unfair in permitting the government to carry out its policies.

Reversed and remanded with directions to the district court to dismiss the complaint.

Judgment of the United States Court of Appeals For the First Circuit

No. 7687.

CHARLES A. SILVERMAN ET AL.,

PLAINTIFFS, APPELLEES,

v.

WILLIAM P. ROGERS, ETC., ET AL.,

DEFENDANTS, APPELLANTS.

JUDGMENT

Entered: December 30, 1970

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the district court is vacated and the cause is remanded to that court with directions to dismiss the complaint. Costs to appellants.

By the Court:
DANA H. GALLUP
Clerk

[cc: Messrs. Masterton, Swartz and Brennan.]

APPENDIX B

CHARLES A. SILVERMAN and ULKU SILVERMAN,
PLAINTIFFS,
v.
WILLIAM P. ROGERS ET AL.,
DEFENDANTS.
Civ. A. No. 70-191.

UNITED STATES DISTRICT COURT,
D. MASSACHUSETTS.
Feb. 25, 1970.

Herbert S. Swartz, Brookline, Mass., for plaintiffs.

Herbert F. Travers, Jr., U. S. Atty., Stanislaw R. J. Suchecki, Asst. U. S. Atty., Boston, Mass., for defendants.

MEMORANDUM AND ORDER ON MOTIONS FOR PRELIMINARY INJUNCTION AND TO DISMISS AND FOR SUMMARY JUDGMENT

GARRITY, District Judge.

This is an action by a Massachusetts resident and his alien wife to review a denial by the Attorney General of the United States and his authorized agents of plaintiffs' application under 8 U.S.C. § 1182(e) for a waiver of the foreign residence requirement of that subsection of the statute. Plaintiffs seek a judgment instructing the defendants to issue the waiver. They have moved for a preliminary injunction to enjoin commencement of deportation proceedings against Mrs. Silverman. Defendants have responded with a motion to dismiss the complaint or in the alternative for summary judgment. The parties have filed memoranda of law. At a hearing on the motions the court received in evidence a certified copy of the entire applicable administrative proceedings. Also the parties stipulated, with im-

material modifications, that the facts alleged in the defendants' memorandum are true.[1]

Plaintiff Mrs. Silverman is a citizen of Turkey and came to the United States as an exchange visitor in 1964 to study and train in psychiatric nursing. This was to enable her to qualify as an instructor at a school of nursing in Turkey. Her travel and education have been financed by the United States Agency for International Development. She was scheduled originally to spend one year in America, but a number of extensions were granted in order that she might further her studies and training. On March 9, 1969 she married plaintiff Mr. Silverman, who is a United States citizen. On April 24, 1969, Mrs. Silverman applied for a waiver of the foreign residence requirement of Section 212(e) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(e), on the ground that her compliance would impose exceptional hardship on Mr. Silverman, who suffers from various medical ailments. The Commissioner of Immigration and Naturalization, acting through District Director Hamilton, determined on April 28, 1969 that compliance would impose exceptional hardship upon Mr. Silverman. On that day defendant Hamilton forwarded Mrs. Silverman's application to the Department of State with a covering letter whose concluding paragraph was:

> "In view of the foregoing, it has been determined that compliance with the foreign residence requirement of Section 212(e), supra, would impose exceptional hardship upon Mrs. Silverman's United States citizen husband. It is therefore requested that the Secretary of State recommend whether the waiver should be granted."

On October 29, 1969 the appropriate official in the Depart-

[1] These appear on the first four and a fraction pages of the defendants' memorandum under the heading "Facts" and in the complete paragraph at the bottom half of page 10.

ment of State replied by letter stating in part that in view of extended discussions with the Agency for International Development and the Turkish Government and other factors, "the Department of State recommends that Mrs. Silverman not be granted a waiver of the two year foreign residence requirement." District Director Hamilton wrote to Mrs. Silverman by letter dated December 11, 1969 reciting the information obtained from the Department of State and stating,

> "In view of all these factors, the Department of State has recommended that you not be granted a waiver of the two-year foreign residence requirement. Your application has therefore been denied. No appeal lies from this decision as a favorable recommendation from the Secretary of States was not received [8 CFR 212.—7(c)]."

This action was commenced January 30, 1970.

The pertinent section of the statute, 8 U.S.C. § 1182(e), was added in 1961 by Pub.L. 87-256, 1961, U.S. Code Cong. and Admin. News, pp. 598, 606, and provides as follows:

> (e) No person admitted under section 1101(a) (15) (J) of this title or acquiring such status after admission shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under section 1101(a) (15) (H) of this title until it is established that such person has resided and been physically present in the country of his nationality or his last residence, or in another foreign country for an aggregate of at least two years following departure from the United States: Provided, That such residence in another foreign country shall be considered to have satisfied the requirements of this subsection if the Secretary of State determines that it has served the purpose and the intent of the Mutual Educational and Cultural Exchange Act of 1961: Provided further,

> That upon the favorable recommendation of the Secretary of State, pursuant to the request of an interested United States Government agency, or of the Commission of Immigration and Naturalization after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien), the Attorney General may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest: And provided further, That the provisions of this subchapter shall apply also to those persons who acquired exchange visitor status under the United States Information and Educational Exchange Act of 1948, as amended.

Regulations implementing this section appear at 8 C.F.R. § 212.7(c) and 22 C.F.R. § 63.6(a), (e) and (f) and § 63.7.

[1, 2] The first issue is whether the court has jurisdiction. We believe that it does under 5 U.S.C. §§ 701-706. Cf. Rusk v. Cort, 1962, 369 U.S. 367, 82 S. Ct. 787, 7 L.Ed.2d 809. Plaintiffs allege that the Attorney General has failed to exercise the discretion granted to him in accordance with the statute. The restriction on judicial review of agency action committed to agency discretion by law does not mean that the right to judicial review does not exist to determine whether or not discretion has been exercised. See United States ex rel. Adel v. Shaughnessy, 2 Cir., 1950, 183 F.2d 371, 372, and cases cited in n. 3. Deportation proceedings under § 242(b) of the Immigration and Nationality Act, 8 U.S.C. § 1252(b), have not as yet been instituted and the remedy in the Court of Appeals afforded by § 106(a) of the Act, 8 U.S.C. § 1105a(a), is unavailing. Therefore plaintiffs' remedies lie in an action in this court. Cheng Fan

Kwok v. Immigration and Naturalization Service, 1968, 392 U.S. 206, 210, 217, 88 S. Ct. 1970, 20 L.Ed.2d 1037; Immigration and Naturalization Service v. Stanisic, 1969, 395 U.S. 62, 68 n. 6, 89 S.Ct. 1519, 23 L.Ed.2d 101; Butterfield v. Immigration and Naturalization Service, 1969, 133 U.S. App.D.C. 135, 409 F.2d 170, 174.

An examination of the complete administrative file leaves no doubt that after having determined that Mrs. Silverman's departure from the United States would impose exceptional hardship upon Mr. Silverman, District Director Hamilton considered that a favorable recommendation of the Secretary of State was a prerequisite to granting of the waiver and that refusal of the waiver was automatic in view of his not having received a favorable recommendation from the Secretary of State. The same understanding was stated explicitly by another district director in Matter of Tran, Interim Decision No. 1526, 1965, 11 I.N. 53. Neither the Attorney General nor his authorized agent has made an independent determination in the instant case whether waiver would be in the public interest.

[3] The court construes the statute to provide that decision by the Attorney General whether to waive the foreign residence requirement may be based either upon the favorable recommendation of the Secretary of State or upon that of the Commissioner after a determination of exceptional hardship. This construction seems to be required by the plain language of the second proviso of § 1182(e), especially the punctuation and the word "of" as underlined in the following excerpt, "That upon the favorable recommendation of the Secretary of State, pursuant to the request of an interested United States Government Agency, or of the Commissioner of Immigration and Naturalization after he has * * *." The Immigration Regulations, 8 C.F.R. § 212.7(e), are consistent with the

court's opinion inasmuch as they make no reference to consulting the Secretary of State after a determination of exceptional hardship. This interpretation of the statute also guards the interest obviously underlying the particular proviso, to wit, protection of a United States citizen against exceptional hardship, which interest ordinarily conflicts with considerations of foreign policy of prime concern to the Secretary of State.

The court is aware that its interpretation is at odds with regulations implementing the exchange-visitor program, 22 C.F.R. §§ 63.6 and 63.7. It may be noted, however, that there is a significant variation in the language of § 63.6(a) from that of the statute: that subsection of the regulations omits the word "of" which has been emphasized by the court. The relevant sentence in the regulations reads, "It further provides that upon the favorable recommendation of the Secretary, pursuant to the request of an interested United States Government Agency, or the Commissioner of Immigration and Naturalization after he has determined that departure from the United States would impose exceptional hardship * * *." The court considers that this provision of the regulations does not carry out the intent of the statute.

[4-6] The court does not rule that the Attorney General may not in his discretion solicit the recommendation of the Secretary of State. Cf. Secretary of Defense v. Bong, 1969, 133 U.S. App. D.C. 264, 410 F.2d 252, 255. In determining whether waiver in the case of a particular alien would be in the public interest, the Attorney General has broad discretion and may balance the exceptional hardship of a United States citizen against all other factors which he reasonably considers to affect the public interest. What the court here holds on the motion for preliminary relief is that favorable recommendation of the Secretary of State

is not a prerequisite to waiver by the Attorney General and may not properly be treated as such.[2]

Accordingly, the court denies the defendants' motion to dismiss and for summary judgment. It finds that the plaintiffs have shown a likelihood of prevailing on the merits and that plaintiffs may well be irreparably harmed if deportation proceedings are instituted against plaintiff Mrs. Silverman before final disposition of these proceedings. The contentions made by plaintiffs in this case may not be advanced upon a review of deportation proceedings. "* * * Congress quite deliberately restricted the application of § 106(a) to orders entered during proceedings conducted under § 242(b), or directly challenging deportation orders themselves." Cheng Fan Kwok v. Immigration and Naturalization Service, *supra*, 392 U.S. at 215, 88 S. Ct. at 1975-1976. No damage will be caused defendants by allowance of plaintiffs' motion for a preliminary injunction. At the hearing, neither party spoke to the requirement of security under Rule 65(c), Fed. R. Civ. P. The court will make no order for security unless defendants move for one.

An appropriate preliminary injunction will issue.

PRELIMINARY INJUNCTION

Upon plaintiffs' motion and after hearing and consideration of memoranda of law filed by the parties and on the basis of the findings of fact and conclusions of law stated in the court's separate memorandum filed herewith, it is

Ordered, adjudged and decreed that defendants William P. Rogers, as he is the duly appointed Secretary of State for the United States of America, John N. Mitchell, as he is the duly appointed Attorney General for the United

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[2] Before final disposition of this case the parties are invited to research the legislative history of the statute to a greater extent than has been done thus far. The court's research to date has been restricted mainly to U.S. Code Congressional and Administrative News and has produced nothing significant on the precise issue herein discussed.

States of America, Raymond S. Farrell, as he is the duly appointed Commissioner of Immigration and Naturalization for the United States of America, all three of Washington, D.C., and J.A. Hamilton, Jr., as he is the duly appointed District Director of the United States Department of Justice, Immigration and Naturalization Service, Boston, Massachusetts, their agents and attorneys and all persons in participation with them who receive actual notice of this order are hereby enjoined during the pendency of these proceedings from instituting deportation proceedings against plaintiff Ulku Gurkan Silverman until after the Attorney General shall have reconsidered and found anew whether waiver of the foreign residence requirement under 8 U.S.C. § 1182(e) in the case of plaintiff Ulku Gurkan Silverman is in the public interest.

APPENDIX C

8 U.S.C.A. 1182(e) (1964) at the time of the decision below.

No person admitted under section 101(a)(15)(J) or acquiring such status after admission shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under section 101(a)(15)(H) until it is established that such person has resided and been physically present in the country of his nationality or his last residence or in another foreign country for an aggregate of at least two years following departure from the United States: *Provided,* That such residence in another foreign country shall be considered to have satisfied the requirements of this subsection if the Secretary of State determines that it has served the purpose and the intent of the Mutual Educational and Cultural Exchange Act of 1961;

Provided further, That upon the favorable recommendation of the Secretary of State, pursuant to the request of an interested United States Government agency, or of the Commissioner of Immigration and Naturalization after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien) the Attorney General may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest; *And provided further,* That the provisions of this paragraph shall apply also to those persons who acquired exchange visitor status under the United States Information and Educational Exchange Act of 1948, as amended.

APPENDIX D

8 U.S.C.A. 1182(e) as amended in April of 1970.

(e) No person admitted under section 1101(a)(15)(J) of this title or acquiring such status after admission whose (i) participation in the program for which he came to the United States was financed in whole or in part, directly or indirectly, by an agency of the Government of the United States or by the government of the country of his nationality or his last residence, or (ii) who at the time of admission or acquisition of status under section 1101(a)(15)(J) of this title was a national or resident of a country which the Secretary of State, pursuant to regulations prescribed by him, had designated as clearly requiring the services of persons engaged in the field of specialized knowledge or skill in which the alien was engaged, shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under section 1101(a)(15)(H) or section 1101(a)(15)(L) of this title until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate of at least two years following departure from the United States; *Provided*, That upon the favorable recommendation of the Secretary of State, pursuant to the request of an interested United States Government agency, or of the Commissioner of Immigration and Naturalization after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien), or that the alien cannot return to the country of his nationality or last residence because he would be subject to persecution on account of race, religion, or political opinion, the Attorney General may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to

the United States is found by the Attorney General to be in the public interest: *And provided further,* That the Attorney General may, upon the favorable recommendation of the Secretary of State, waive such two-year foreign residence requirement in any case in which the foreign country of the alien's nationality or last residence has furnished the Secretary of State a statement in writing that it has no objection to such waiver in the case of such alien.

APPENDIX E

Regulation 8 C.F.R. 212.7(c), in pertinent part provides:

(c) *Section 212(e).* An alien who has been a participant in an exchange program and who believes that compliance with the foreign residence requirement of section 212(e) of the Act would impose exceptional hardship upon his spouse or child who is a citizen of the United States or a lawful permanent resident alien shall apply for a waiver on Form I-612. . . . A statement, dated and signed by the applicant, shall also be attached to the application giving a detailed explanation of the basis for his belief that his compliance with the foreign residence requirement of section 212(e) of the Act, as amended, would impose exceptional hardship upon his spouse or child who is a citizen of the United States or a lawful permanent resident thereof. The statement shall include all pertinent information concerning the incomes and savings of the applicant and spouse. If exceptional hardship is claimed upon medical grounds, the applicant shall submit a medical certificate from a qualified physician setting forth in terms understandable to a layman the nature and effect of the illness and a prognosis as to the period of time the spouse or child will require care or treatment. The applicant and his spouse may be interviewed by an immigration officer in connection with the application. The applicant shall be notified of the decision and, if the application is denied, of the reasons therefor and of his right to appeal in accordance with the provisions of Part 103 of this chapter. However, no appeal shall lie from denial of an application for lack of a favorable recommendation from the Secretary of State. The interested U. S. Government agency requesting a waiver of the 2-year foreign residence requirement shall be notified of the decision on its request and, if the request is denied, of the reasons therefor, and of the foregoing right of appeal.

APPENDIX F

Regulation 22 C.F.R. 63.6 and 63.7, as pertinent, provide:

§63.6 Requests for waivers of the foreign residence requirement of section 212(e) of the Immigration and Nationality Act, as amended.

(a) Section 212(e) of the Immigration and Nationality Act, as amended, provides in part that no person admitted under section 101(a)(15)(J) or acquiring such status after admission shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under section 101(a)(15)(H) until it is established that such person has resided and been physically present in the country of his nationality or his last residence, or in another foreign country for an aggregate of at least two years following departure from the United States. . . . It further provides that upon the favorable recommendation of the Secretary pursuant to the request of an interested United State [sic] Government agency, or the Commissioner of Immigration and Naturalization after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien), the Attorney General may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest . . .

* * *

(e) The request must be supported by documentary evidence demonstrating that issuance of the waiver is in the public interest because the two-year period of residence abroad would (1) impose exceptional hardship upon the exchange visitor's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident

alien), or (2) be clearly detrimental to a program or activity of official interest to an agency of the Government of the United States.

(f) An exchange visitor who wishes to apply for a waiver under paragraph (e)(1) of this section shall apply to the District Director of the Immigration and Naturalization Service having administrative jurisdiction over the alien's place of temporary residence in the United States . . . If, after consideration of an application, the Commissioner of Immigration and Naturalization determines that compliance with the foreign residence requirement would impose exceptional hardship upon the spouse or child who is an American citizen, or permanent resident, the request showing such determination shall be submitted to the Bureau of Educational and Cultural Affairs of the Department for the Secretary's recommendation. An exchange visitor who wishes to apply for a waiver under paragraph (e)(2) of this section shall apply to the United States Government agency interested in his case. If the interested agency views his case favorably, it shall transmit its request to the Bureau of Educational and Cultural Affairs of the Department for the Secretary's recommendation.

§63.7 Action by the Secretary on requests for waiver of the foreign residence requirement of section 212(e) of the Immigration and Nationality Act, as amended.

Upon receipt of a request from an interested United States Government agency or from the Commissioner of Immigration and Naturalization that the foreign residence requirement of section 212(e) of the Immigration and Nationality Act, as amended, be waived in the case of an exchange visitor, the Secretary shall review the policy, program, and foreign relations aspects of the case and in appropriate instances shall transmit his recommendation to the Attorney General for the latter's finding and consequent action.

APPENDIX G

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
John Fitzgerald Kennedy Federal Building
Government Center
Boston, Massachusetts 02203 223-2361
December 11, 1969

Mrs. Ulku Gurkan Silverman
1086 Commonwealth Avenue
Apartment 101
Boston, Massachusetts 02215

Dear Mrs. Silverman:

This refers to your application for a waiver of the two-year foreign residence requirement of Section 212(e) of the Immigration and Nationality Act, as amended.

The Department of State and this Service have reviewed the facts in your case very carefully. The Department of State has had extended discussions with the Agency for International Development and the Government of Turkey concerning your training in the United States. The Turkish Government has held that your services are indispensable and is holding a position open for you at the Florence Nightingale Nursing Home in Istanbul. You have signed a bond which obligates you to serve for a period of ten years in Turkey after completing your training in this country. If you do not return to your native land, those who signed as guarantors for the bond will be required by the Turkish Government to pay approximately $40,000 as compensation.

In view of all these factors, the Department of State has recommended that you not be granted a waiver of the two-year foreign residence requirement. Your application has therefore been denied. No appeal lies from this decision as a favorable recommendation from the Secretary of State was not received [8 CFR 212.7(c)].

It will, therefore, be necessary that you arrange to depart from the United States on or before February 11, 1970. You must notify this office by February 1, 1970 of the date, place and manner of your departure. When you leave the United States, do not fail to surrender Form I-94, Arrival-Departure Record, in accordance with the instructions on that form.

Very truly yours,
(s) J. A. HAMILTON, JR.
J. A. HAMILTON, JR.
District Director

APPENDIX H

[LETTERHEAD — DEPARTMENT OF STATE]

Mr. J. A. Hamilton, Jr.
District Director — Oct. 29, 1969
Immigration and Naturalization Service
John Fitzgerald Kennedy Federal Building
Government Center
Boston, Massachusetts 02203

Dear Mr. Hamilton: — A14 015 757

I refer to your letter of July 15, 1969 concerning the application of Mrs. Ulku Gurkan Silverman for a waiver of the two year foreign residence requirement of Section 212(e) of the Immigration and Nationality Act. I wish to thank you for the additional information which you sent.

We have had extended discussions with the Agency for International Development and the Turkish Government concerning the training given to Mrs. Silverman. The Turkish Government believes her services are indispensable, and a position is being held open for her at the Florence Nightingale Nursing Home in Istanbul. In addition, she has signed a bond which obligates her to serve for a period of ten years in Turkey after finishing her training here. If she does not return, those who signed as guarantors for the bond will be required by the Turkish Government to pay approximately $40,000 as compensation.

In view of all these factors, the Department of State recommends that Mrs. Silverman not be granted a waiver of the two year foreign residence requirement.

Sincerely yours,
For the Secretary of State:
(s) JOHN A. ANDEREGG, *Chief*
Facilitative Services Division
Bureau of Educational and
Cultural Affairs

Enclosure:
Form I-612.

APPENDIX I

IMMIGRATION AND NATURALIZATION CASES INVOLVING A FINDING OF "EXCEPTIONAL HARDSHIP," AND WAIVER BY THE SECRETARY OF STATE.*

1. *Matter of Davoudlarian,* 11 I.N. 300 (I.D. 1503, 1965) — physician unable to obtain employment or practice in Lebanon, wife's mother in United States ill. No mention of "public interest."

2. *Matter of Mansour,* 11 I.N. 306 (I.D. 1505, 1965) — physician whose return to Egypt would result in financial and religious hardships to wife, wife's emotional problem would be aggravated by separation. One sentence finding by the District Director at the close of the case that it was in the "public interest."

3. *Matter of Habib,* 11 I.N. (I.D. 1545, 1965) — family income would be sharply reduced, wife unable to work because of tender age of child, and foreign government would not permit him to leave after his return. No mention of "public interest" in the case.

4. *Matter of Arabian,* 11 I.N. 496 (I.D. 1554, 1966) — husband would lose job and means of supporting family if he accompanied them abroad, employment opportunities for him limited in wife's country, and excessive emotional strain on children. District Director made one sentence finding at end of case that waiver was in "public interest."

5. *Matter of Bridges,* 11 I.N. 506 (I.D. 1557, 1965) — financial hardship to husband would require him to abandon his studies and disrupt his career. District Director made one sentence finding at end of case that it was in the "public interest."

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* The only decision of a District Director in which a waiver was not granted because of lack of a "favorable recommendation" for waiver by the Secretary of State was *Matter of Tran,* 11 I.N. 395 (I.D. 1526, 1965). No reasons are given for the denial.

6. *Matter of Kim,* 11 I.N. (I.D. 1558, 1965) — upon return to Korea, husband would be subject to military service and unable to support his family, wife and children under medical treatment. No mention of "public interest" in the case.

7. *Matter of Bass,* 11 I.N. 512 (I.D. 1559, 1966) — attorney financially incapable of maintaining two households and wife unable to sustain herself in Brazil. No mention of "public interest" in the case.

8. *Matter of Cruikshank,* 11 I.N. 558 (I.D. 1573, 1966) — spouse and child would be subject to persecution in Afghanistan, and financial hardship if alien returned alone. District Director made one sentence at end of his report that waiver was in the "public interest."

9. *Matter of Duchneskie,* 11 I.N. 583 (I.D. 1576, 1966) — financial hardship at maintaining two households since husband could not be gainfully employed in Philippines, and dental program for children primarily benefited the United States. District Director asserted in his order at end of the case that it, the waiver, was in the "public interest."

10. *Matter of Courpas,* 11 I.N. 647 (I.D. 1595, 1966) — parents who were physicians would be subject to discrimination in their own countries, and financial hardship to a citizen child would result. In this case the District Director relied on information from the Department of State in order to determine "exceptional hardship." No statement of "public interest" in the case.

11. *Matter of Nassiri,* 12 I.N. 756 (I.D. 1870, 1968) — insufficient salary and care available in foreign country. District Director made statement in his report that it, the waiver, was in the "public interest."

12. *Matter of Chong,* 12 I.N. 793 (I.D. 1882, 1968) — waiver granted because of the postponing of education of the alien that would be involved. District Director made the statement that waiver was in the "public interest."

13. *Matter of Kawaski,* 12 I.N. 864 (I.D. 1869, 1968) -- separation from spouse's mother who was ill with cancer was grounds for "exceptional hardship." District Director made statement that waiver was in the "public interest."